IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

SA.No. 649 of 1992(B)

AS.14/1976 of SUB COURT, PALAKKAD
OS.23/1973 of MUNSIFF COURT, PALAKKAD
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APPELLANT: RESPONDENT/ PLAINTIFF:

KANDANKUTTY SON OF APPUKUTTY,
ELATHIANKODE, KANNANURE AMSOM,
PALAGHAT TALUK

BY ADV. SRI.T.C.MOHANDAS
SRI.T.M.SUNIL

RESPONDENTS: APPELLANTS/ DEFENDANTS:

*** 1. CHELLAN, SON OF KUNJUVELLA,**
ELANTHIANKODE,
KANNANUR AMSOM,
PALAKKAD TALUK. (SINCE DIED)LR'S IMPLEADED:

*** 2. YESODA, WIFE OF CHELLAN, DO. DO.**
(SINCE DIED. RECORDED. RECORDED AS ONE OF THE LR'S OF THE DECEASED R1)

ADDL. RESPONDENTS 3TO 9 ARE IMPLEADED.

3. C.CHENTHAMARAKSHAN, S/O.CHELLAN,
KALIANKANDATH HOUSE, ELANTHIANKODE,
KANNANUR AMSOM, KUNNATHURMEDU,
PALAKKAD.

4. C.ARAVINDAKSHAN, S/O. CHELLAN,
KALINAKANDATH HOUSE, MANAPPULLIKKAVU,
KUNNATHURMEDU P.O., PALAKKAD.

5. C.RAMAKRISHNAN, S/O. CHELLAN,
KALIANKANDATH HOUSE, ELANTHIANKODE,
KUNNATHURMEDU P.O., PALAKKAD.

6. C.RADHAKRISHNAN, S/O. CHELLAN,
KALIANKANDATH HOUSE, CHITTUR ROAD,
KUNNATHURMEDU P.O. PALAKKAD.

..2/-

7. C.MANI, S/O. CHELLAN, MALUAMMA KALAM,
NANNIODE P.O., CHITTUR TALUK,
PALAKKAD.

8. C.SANTHAKUMAR, W/O. PUSPARAJAN,
NADAKKAVU HOUSE, PALLANCHATHANUR P.O.,
NADAKKAVU HOUSE, PALLANCHATHANUR P.O.,
COYALMANNAM VIA, PALAKKAD.

9. C.RAJI, W/O. A.N. SIVADASAN,
KADUNGATH KALAM, EZHAKKAD P.O.,
MUNDUR VIA, PALAKKAD

* THE DEATH OF R2 IS RECORDED.ADDL. RESPONDENTS 3 TO 9 ARE IMPLEADED AND RESPONDENT NO.2 RECORDED AS THE LRS OF DECEASED 1ST RESPONDENT & R2 VIDE ORDER IN IA. 2190/06 DT. 29.11.06 .

BY ADV. SRI.P.VELAYUDHAN)
SRI.T.M.CHANDRAN) for R1 & R2
SRI.V.CHITAMBARESH)
SRI.T.C.SURESH MENON) for Addl.R1
SRI.M.RAMESH CHANDER)
SMT.P.VANDANA) for Addl.R3

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.649 OF 1992

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Dated this the 14th day of June, 2007

JUDGMENT

Plaintiff in O.S.23/1973 on the file of Munsiff Court, Palakkad is the appellant. Defendants are the respondents. The case had an unfortunate checkered history. The suit was filed seeking a decree for recovery of possession of a small strip of land lying in two survey numbers alleged to have been trespassed by the defendants more than two decades back. The trial court decreed the suit. Defendants filed an appeal. The first appellate Court as per the original judgment disagreed with the finding of the trial court on the correctness of Ext.C1 plan prepared by the Commissioner demarcating the properties. Holding that there are "conscious interliniations and additions in Exts.A1 and A4 title deeds relied on by the plaintiff, the decree granted by the trial court was set aside and the suit was dismissed. Plaintiffs challenged

the said decree and judgment before this Court in S.A.18/1980. This Court found that case of the plaintiff that his property is lying in survey No.3354/1B and 3355/2 was not disputed by the defendants. It was also found contention in the written statement was only that defendants have constructed the disputed building three feet to the south of the dividing line demarcating the survey numbers and the real dispute is where exactly the survey boundary line of the respective survey numbers lies and not whether plaintiff has title to the property comprised in R.S.No.3354/1B and 3355/2. This court held that in the nature of the contentions raised by the parties, first appellate Court should not have gone into the question of title based on Exts.A1 and A4 and instead should have found whether the properties are correctly demaracted in Ext.C1 plan. This court also found that the first appellate Court had interfered with the findings of the trial court on the correctness of Ext.C1 plan without any sort of discussion and

did not advert to any reasons for coming to that conclusion. Therefore the judgment of the first Appellate Court was set aside and first appeal was remanded with on the following directions.

> "That court should consider whether the measurements in Ext.C1 plan are correct and if so, whether the disputed portions fall within the two survey numbers claimed by the plaintiff. If the finding on the aforesaid point is in favour of the plaintiff, the court below has next to consider the evidence regarding the plea of adverse possession and arrive at a decision as to whether the rights of the plaintiff has been lost by adverse possession."(underline

supplied)

Therefore what was directed by this court was to firstly consider whether the properties are correctly demarcated in Ext.C1 plan and Ext.C1 plan is correct. This court also made it clear that on such correct demarcation, if the disputed property falls in survey No.3354/1B and 3355/2, first appellate Court need not further probe further the question whether plaintiff has title to that property as defendants did not claim any right over the properties in those survey numbers, and so plaintiff is entitled to the decree unless his title is barred by adverse possession and limitation. After remand, first appellate Court again found that Ext.C1 plan cannot be relied on and held that plaintiff is not entitled to the decree. That judgment was challenged by the plaintiff in S.A.543/1986. This Court again remanded the first appeal holding that the first Appellate Court did not comply with the directions in the order of remand. Learned Sub Judge

thereafter heard the appeal once again and as per judgment dated 31.1.1992 allowed the appeal and dismissed the suit. The Second Appeal is filed challenging the said judgment.

2. Second Appeal was admitted formulating the following substantial questions of law.

> 1. The finding on title in S.A.No.18/1980 being that the plaintiff has title to the entire property in R.S.No.3354/1B and 3355/2 and the remand in S.A.543/1986 was with the specific direction to decide the question whether the disputed portion falls within the two survey numbers mentioned in the plaint schedule is not the function of the lower appellate court limited to

find out whether the disputed area falls within the survey numbers claimed by the plaintiff and whether the first appellate court is justified in further embarking upon the question of the title of the plaintiff to the disputed plot.

2. In view of the orders of remand in S.A.Nos. 18 of 1980 and 543 of 1986 confining the jurisdiction of the first appellate court to two questions namely whether the disputed land is in the two survey numbers claimed by the plaintiff and whether the

suit is barred by adverse possession and limitation, is the first appellate court correct in exceeding the scope of remand and refusing to enter a finding on the question of adverse possession and limitation.

3. The argument of learned counsel appearing for the appellant was that as per the first remand order, the title of the appellant to the property comprised in survey No.3354/1B and 3355/2 was upheld and the first appellate Court was not competent to go into that question further. It was further argued that as per the second remand order, that was reiterated and the correctness of Ext.C1 plan was also confirmed and therefore first Appellate Court is not entitled to go into those questions and as per Ext.C1 plan, the disputed portion falls within survey No.3354/1A and 3355/2, and so learned Sub Judge should have considered

the claim for adverse possession and as it was not done, the judgment is bad for non compliance of the directions of this Court.

4. Learned counsel appearing for the respondents argued that this court did not uphold the correctness of Ext.C1 plan and instead first appellate court was specifically directed to consider whether the properties are correctly demarcated in Ext.C1 plan and only if it is found that Ext.C1 plan is prepared after proper demarcation, and the disputed property falls within the survey numbers claimed by the plaintiff, a decree could be granted and that too only if the plea on adverse possession is negatived and first appellate Court did not find the correctness of Ext.C1 plan and therefore a decree as sought for cannot be granted.

5. On going through the orders of remand passed by this Court in S.A.18/1980 and S.A.543/1986, I cannot agree with the argument of the learned counsel appearing for the appellant

that the entire dispute between the parties on title and correctness of Ext.C1 plan were settled. If the argument of the learned counsel appearing for the appellant is to be accepted, and correctness of Ext.C1 plan was confirmed by this court and title of the appellant to the properties comprised in survey Nos.3354/1B and 3355/2 was also confirmed,the only question left to be decided is whether the disputed portion marked in Ext.C1 plan falls within the survey Nos.3354/1B and 3355/2 and the adverse possession. A reading of the judgment of this court in S.A.18/1980 establish that this court did not affix its seal of approval on the correctness of Ext.C1 plan. On the other hand, the court found that first appellate court without giving any reason and without discussing the correctness of measurements did not accept Ext.C1 and first appellate court should not have skipped over that subject. What was found by this court was that the dispute between the parties was actually whether the disputed

portion of the property falls within R.S. No.3354/1B and R.S.No. 3355/2 belonging to the plaintiff or in the property belonging to the respondents and respondent did not claim any right in the property in R.S.No.3354/1 and 3355/2. The admitted case was that the demarcating boundary between the properties claimed by the plaintiff and defendants is the survey boundary line. This court found that though trial court upheld the correctness of the plan prepared by the Commissioner giving reasons and granted a decree based on Ext.C1 plan, first Appellate Court found otherwise but without giving reasons. Therefore this court held that first Appellate Court should consider whether Ext.C1 plan was drawn up by the Commissioner correctly. It was then held that if the plan is found to be drawn correctly with the correct measurement and the disputed property falls within R.S. Nos.3354/1B and R.S.No. 3355/2 and the defendants failed to establish that they have perfected their title by adverse possession,

plaintiff is entitled to the decree. This court did not hold first appellate Court need only to look into Ext.C1 plan and find out whether the disputed portion as marked therein falls in R.S. Nos.3354/1B and R.S.No.3355/2 as demarcated therein. If that was the case, this court could have decided that issue by looking at Ext.C1 plan. Instead this court wanted the correctness of Ext.C1 plan to be ascertained by the first appellate court before deciding that aspect, and for that purpose the first appeal was remanded. When the matter was considered in the second remand order, this court held that first appellate Court should not have gone into the question of title and should have complied with the directions passed by this court. Though there is a statement in the second remand order that in the first remand order this court "in a way the plan prepared by the Commissioner was approved by this Court." what was held was that the said plan was approved with the directions provided in the first remand order.

Therefore the second remand order cannot be held as a confirmation of correctness of Ext.C1 plan. In the second remand order, this court did not consider the correctness of Ext.C1 plan at all.

6. Unfortunately even after the second remand order first appellate Court did not consider whether Ext.C1 plan was correctly drawn by the Commissioner and whether it could be relied on. In such circumstances, there is no other alternative but to set aside the judgment passed by the first appellate Court once again and remand the matter. The question then is whether a remand is to be made to the first appellate Court or to the trial court as canvassed by the respondents. The orders of remand passed by this Court earlier direct the first Appellate Court to consider the question of correctness of Ext.C1 plan. That is binding on the respondents. They are now not entitled to contend that the case is to be remanded to the trial court. When the first appellate Court did not comply with the directions of this Court and a

remand is warranted, it could be remanded only to the first appellate Court.

7. The appeal is allowed. The judgment of the Sub Court, Palakkad in A.S.14/1976 is set aside. A.S.14/1976 is restored and remanded.The first appellate Court is directed to dispose the appeal afresh in the light of the directions given by this Court in S.A.18/1980 and as clarified in the judgment. It is made clear that first appellate Court is to consider whether the demarcation of the properties in Ext.C1 plan is correct or not. If the Court finds that the demarcation in Ext.C1 plan is not correct, court has to set aside the report and remit the matter back to the trial court for preparing a fresh plan after proper demarcation. On the other hand, if the Court finds that the property is correctly demarcated in Ext.C1 plan and the disputed property falls in survey, R.S. Nos.3354/1B and 3355/2,court need not consider whether plaintiff has title to that property and instead find that plaintiff has title.

Then it is to be considered whether respondents have perfected their title by adverse possession. If it is found against the respondents, plaintiff is to be granted the decree. It is also made clear that if first appellate Court finds that question of correctness in Ext.C1 plan cannot be decided without further evidence, first appellate Court can be granted permission to the parties to adduce evidence to that limited purpose. If it is found that the disputed property does not fall in R.S.3354/1B or 3355/2 or even if falls respondents have perfected their title by adverse possession the suit shall be dismissed. Parties are directed to appear before the Sub Court, Palakkad on 18.7.07. Send back the records to Sub Court, Palakkad forthwith.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006